



Alerts

Illinois Appellate Court Affirms \$6 Million Judgment, But Also Upholds Jury's Rejection of Claim for Lost Profits

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Lawyers for the Profession® Alert

Meriturn Partners, LLC v. Banner and Witcoff, Ltd., 2015 WL 1955384 (Ill. App. 1 Dist.)

Brief Summary

An Illinois appellate court rejected defendants' argument that they agreed to represent Meriturn *only*, and not an outside investment group. The court held that although the written retention agreement was expressly between Meriturn and defendants, the evidence was sufficient to conclude that there was an attorney-client relationship between defendants and the outside investors. The court also held that even if it had found that no attorney-client relationship existed between defendants and the outside investors, those plaintiffs could recover on the basis that they were known third-party beneficiaries. The court also rejected plaintiffs' claim that they were entitled to lost profits.

Complete Summary

Meriturn Partners, LLC (Meriturn) is a private equity company that collaborates with others to invest in troubled businesses, attempting to turn them around for a profit. In 2005, Meriturn was interested in investing in a company called Sustainable Solutions. Meriturn and Sustainable Solutions began to outline the general terms of a proposed transaction, but a final decision on whether to invest was deferred until more due diligence could be conducted.

Meriturn retained counsel, Jeffrey Hechtman, to structure and oversee the transaction. Hechtman advised that because Sustainable Solutions' business relied upon proprietary processes that were the subject of patents, Meriturn should retain counsel that regularly worked in that area. Meriturn thus retained defendants to perform due diligence on certain intellectual property issues. Defendants memorialized the representation in a letter and referred only to defendants' representation of Meriturn.

Meriturn was committing \$3 million to the deal, and the other \$3 million was to come from an outside investor group, the other plaintiffs in this case. While defendants were completing the due diligence as to the intellectual property issues, they were communicating with not only Meriturn, but also representatives of the investor group. Upon completion of the due diligence, defendants communicated to Meriturn that all the patents at issue were owned

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by Sustainable Solutions. Based on this, Meriturn went forward with the investment. Soon thereafter, it was discovered that the prior owner of Sustainable Solutions was engaged in double-dealing and other misdeeds, and that one of the patents at issue was owned by individuals and not by Sustainable Solutions. Plaintiffs alleged that upon learning that Sustainable Solutions did not own the patent, the proposed venture fell apart.

Plaintiffs sued defendants as a result of the failed business venture, and a jury awarded plaintiffs \$6 million. The appellate court was required to determine whether the plaintiffs other than Meriturn were entitled to recover. Defendants argued they agreed to represent Meriturn and Meriturn only. As noted, the written retention agreement was expressly between Meriturn and defendants, and not the investor group. The court initially noted that "a client cannot unilaterally create the relationship, and the putative client's belief that the attorney is representing him is only one consideration." *Rosenbaum v. White*, 692 F.3d 593, 601 (7th Cir. 2012). "However, if an attorney knows that a person is relying on his performance of services and he performs for that person's benefit without limitation, an attorney-client relationship can be found." Restatement (Third) of the Law Governing Lawyers § 14 (2000).

The court found that the evidence demonstrated that defendants consented to perform services for the transaction as a whole, and not just for Meriturn, and was sufficient to conclude there was an attorney-client relationship between defendants and the outside investors. The court concluded that defendants knew about the investors, claimed to have expertise in the area of intellectual property necessitating understanding of multiparty transactions, and should have known their legal advice was flowing to people outside of Meriturn. The court also stated that "even if we had found that no attorney-client relationship existed between defendants and the outside investors, those plaintiffs could recover on the basis that they were known third-party beneficiaries to the undisputed attorney-client relationship between Meriturn and defendants. If a non-client is an intended third-party beneficiary of the relationship between the client and the attorney, the attorney's duty to the client may extend to the non-client as well." See *In re Estate of Powell*, 2014 IL 115997, ¶ 14.

In a cross-appeal, plaintiffs argued that they were entitled to a new trial on their claim of lost profits. Plaintiffs presented two lost-profit theories: an alternative investment theory and a sales projection theory. The trial court granted a motion *in limine* and barred the sales projection theory, but it allowed plaintiffs to go forward on the alternative investment theory. After presenting evidence on that theory at trial, the jury awarded no damages for lost profits. The appellate court noted that recovery of lost profits cannot be based upon conjecture or speculation, and the evidence must afford a reasonable basis for the computation of damages. *Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 143 Ill.App.3d 168, 174 (1986). After reviewing the law on lost profits, the appellate court affirmed the jury's rejection of plaintiffs' claim for lost profits.

Significance of Opinion

The decision is significant because it underscores the risk management significance of drafting clearly defined engagement letters, which identify the client (and perhaps nonclients), and the potential unintended consequences of unclear communications regarding the scope and extent of the attorney-client relationship. If a nonclient is a directly intended third-party beneficiary of the relationship between the client and the attorney, the attorney's duty to the client may extend to the nonclient as well. This case is also significant because the court addressed whether or not lost profits may be recovered under certain circumstances, such as when the plaintiff has an established business with a history of success.

For more information, please contact [Terrence P. McAvoy](#).